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No. 98-1689

In the Supreme Court of the United States

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under 10 U.S.C. 628 and 1552, a Board for Correction of Military Records may correct the personnel record of an officer passed over for promotion and recommend that a Special Selection Board consider whether the officer should be retroactively promoted based upon the corrected record, without voiding the original non-promotion decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 163 F.3d 1304. The four orders of the Court of Federal Claims (Pet. App. 50-108) are unreported. The record of proceedings before the Air Force Board for Correction of Military Records (Pet. App. 109-134) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1998. A petition for rehearing was denied on January 20, 1999 (Pet. App. 48-49). The petition for a writ of certiorari was filed on April 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the military's statutory "up or out" personnel system, an officer twice non-selected or "passed over" for promotion to the next higher grade is generally subject to mandatory discharge. See 10 U.S.C. 630-637 (1994 & Supp. III 1997). A discharged officer may challenge his non-selection for promotion before a Board for Correction of Military Records (BCMR). A BCMR "may correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1). The Board's decision is subject to judicial review and can be set aside if the decision is arbitrary or capricious. See *Clinton* v. *Goldsmith*, 119 S. Ct. 1538, 1544 (1999); *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983).

The Defense Officer Personnel Management Act (DOPMA), Pub. L. No. 96-513, § 105, 94 Stat. 2859, codified in relevant part at 10 U.S.C. 628, authorizes the Secretary of the "military department concerned" to convene Special Selection Boards (SSBs) to determine whether an officer "should be recommended for promotion" when the officer "was considered for selection for promotion by a selection board but was not selected" and "the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error." 10 U.S.C. 628(b)(1).

2. Petitioner served on active duty as a Reserve Officer in the United States Air Force from 1981 to 1985, when he was honorably, but involuntarily, discharged after having twice been passed over for promotion to captain by promotion selection boards meeting in 1984 and 1985. Pet. App. 5, 51. Following his first promotion pass-over, in 1984, petitioner filed an

application with the Air Force Board for the Correction of Military Records (AFBCMR), claiming that the pass-over was invalid because the promotion board had before it an erroneous Officer Effectiveness Report (OER) dated January 1984. *Id.* at 5, 52.

After petitioner had been non-selected for a second time in 1985, the AFBCMR issued its decision holding that the January 1984 OER had unfairly underrated petitioner's promotion potential. The Board recommended that the OER be voided and that, under 10 U.S.C. 628, petitioner be reconsidered for promotion on a corrected record by two SSBs in lieu of the original selection boards for 1984 and 1985. Pet. App. 5. The AFBCMR did not, however, recommend that petitioner's original promotion pass-overs be voided—action which would have resulted in petitioner's constructive reinstatement and entitlement to back pay and benefits. See *id.* at 2. In 1986, the SSBs convened and determined that petitioner would not have been promoted by the original promotion boards even if they had considered the corrected records. *Id.* at 5, 53.

In 1988, petitioner appealed the SSBs' decisions to the AFBCMR, contending (1) that the removal of the challenged January 1984 OER had created a prejudicial gap in his military record; (2) that his duty titles had been incorrectly listed on some of his OERs; and (3) that a 1984 Letter of Evaluation attached to a November 1984 OER repeated the substance of the January 1984 OER and, thus, perpetuated its negative effect. Pet. App. 5, 54. The AFBCMR denied relief. *Id.* at 6, 55.

On appeal, the Court of Federal Claims held in 1992 that petitioner was not prejudiced by the gap in his records, but the court remanded the case to the AFBCMR to reconsider whether the misstated duty

titles or the 1984 Letter of Evaluation constituted a significant error or injustice and, if so, whether the error was harmless because petitioner would not have been promoted even with the errors corrected. Pet. App. 6-7, 50-83. On remand, the AFBCMR concluded that the 1984 Letter of Evaluation should be removed from petitioner's military personnel record and that the identified duty titles should be corrected. *Id.* at 7, 109-115. The AFBCMR found that, although the "recommended corrections will materially change" petitioner's record, it could not "conclusively determine[] whether or not [petitioner] would have been selected for promotion" by the original promotion boards. *Id.* at 7. The AFBCMR therefore recommended that petitioner again be considered, on the record as additionally corrected, by two new SSBs in place of the original promotion boards. *Id.* at 7-8. In 1993, the new SSBs convened and recommended that petitioner not be promoted. *Id.* at 8, 87.

3. In 1994, the Court of Federal Claims remanded the case to the AFBCMR to determine whether the 1993 SSB proceedings contained adequate records of other officers against which petitioner's record was compared. Pet. App. 8-9, 84-94.[1] The court also held that the AFBCMR impermissibly delegated to the 1993 SSBs the power to determine whether the flawed data presented to the 1986 SSBs amounted to harmless error, rather than making that determination itself. *Id.* at 8, 91-92. The court further ruled that, by referring petitioner's corrected record to the SSBs in 1986 and

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[1] An SSB compares an applicant-officer's records against "benchmark records," *i.e.*, a sampling of the records of the group of officers previously selected and not selected for promotion by the original selection board. See 10 U.S.C. 628(a)(2) and (b)(2).

again in 1993, the AFBCMR necessarily voided the original pass-overs and petitioner was therefore entitled to be retroactively reinstated to active duty with back pay and related benefits. *Id.* at 9, 92-93. Upon the government's motion for clarification, the court ordered the military to correct petitioner's military personnel records constructively to show continuous active duty service from the date of his separation in August 1985 through at least six months after his second pass-over by the November 1993 SSB, pending further review by the AFBCMR. *Id.* at 9-10, 98-99.

On remand, the AFBCMR found that the 1993 SSBs had properly determined that petitioner would not have been promoted by either the original promotion boards or the 1986 SSBs. The AFBCMR also stated that the court improperly had assumed that the AFBCMR had intended to void petitioner's earlier pass-overs so as to reinstate him constructively to active duty with the right to back pay and related benefits. The AFBCMR's conclusions were set forth in a document entitled "Second Addendum to Record of Proceedings." Pet. App. 10-12, 116-134.

In 1996, the Court of Federal Claims affirmed the AFBCMR's decision that the 1993 SSBs contained no reversible error. The court, however, reiterated its earlier holding that the AFBCMR's original referral to the SSBs voided the initial promotion pass-overs and entitled petitioner to back pay and benefits from 1985, the date of his involuntary separation, through May 1994, six months after his non-selection for promotion by the 1993 SSBs. Pet. App. 13.

4. The Court of Appeals for the Federal Circuit reversed. Pet. App. 1-47. The court of appeals observed that petitioner did not argue that the 1993 promotion decisions by the SSBs "[we]re infected with

error" and thus petitioner had conceded "that he is now lawfully discharged." *Id.* at 13, 21. Rather, petitioner argued that, because the AFBCMR lacked the authority to refer his record to an SSB without first voiding his original pass-overs and vacating his discharge, he was entitled to back pay and benefits from 1985 until 1994. *Id.* at 3, 21-22.

Rejecting petitioner's contention, the court of appeals held that "an SSB's decision * * * relate[s] back to the date of the original selection board's decision[,] and * * * the SSB's decision * * * stand[s] in place of the earlier selection board decision." Pet. App. 24-25. The court further found that, "as a matter of statutory interpretation[,] * * * nothing in section 628 requires the constructive reinstatement—via the purge of at least one of the two passovers from the officer's record—of a twice passed over and discharged officer in order to present the officer's record to an SSB." *Id.* at 36.[2] The court also concluded that its reading was supported by the statute's text and legislative history. *Id.* at 24.

The court of appeals also canvassed precedent of the Court of Claims that had reviewed non-selection deci-

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[2] The court of appeals also disagreed with the lower court's conclusion that petitioner must be constructively reinstated before he could be "an officer who is eligible for promotion" subject to review by an SSB under Section 628(b)(1). Pet. App. 35-36. The court of appeals explained that, based on "the certain retroactive character of the SSB deliberative process," "the word 'eligible' in section 628(b) * * * mean[s] eligible as of the time of the consideration of the officer's record by the selection boards whose decisions are later challenged." *Id.* at 36. In 1998, while this action was pending, Congress amended Section 628 to provide that SSBs may consider the promotion decision of any "person who was considered for selection for promotion * * * but was not selected." Act of Oct. 17, 1998, Pub. L. No. 105-261, Div. A, Tit. V, § 501(b)(1), 112 Stat. 2001 (to be codified at 10 U.S.C. 628(b)(1)); see Pet. 7-8.

sions before Section 628 authorized SSBs to determine on a retroactive basis whether a promotion decision contained prejudicial error. Pet. App. 25-32. The court explained that, under that body of law, "fundamental error, at least those affecting the composition of the deciding body," was not subject to harmless error analysis but instead was presumed to have affected the outcome of a non-selection decision and therefore the officer was entitled as a matter of course to have the pass-over voided and to be constructively reinstated with back pay. *Id.* at 32 (citing *Evensen* v. *United States*, 654 F.2d 68 (Ct. Cl. 1981), and *Doyle* v. *United States*, 599 F.2d 984 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980)). Where other errors were involved, however, the pass-over would not be voided or the officer constructively reinstated if the BCMR or the reviewing court determined that the government had proved that the error was harmless, *i.e.*, the error had no impact on the original pass-over decision. *Id.* at 25-32 (discussing *Engels* v. *United States*, 678 F.2d 173 (Ct. Cl. 1982), *Hary* v. *United States*, 618 F.2d 704 (Ct. Cl. 1980), and *Sanders* v. *United States*, 594 F.2d 804 (Ct. Cl. 1979) (en banc)).

The court of appeals then analyzed that body of law in light of the passage of Section 628. The court of appeals concluded that the harmless error rule "has no application" to cases covered by Section 628. Pet. App. 43. The court explained that harmless error analysis would duplicate the promotion decision by the SSB, *id.* at 41-43, and that the old rule "enmeshed the civilian corrections boards and the courts in the essence of promotion *vel non* judgments." The court accordingly found that, under 10 U.S.C. 628 and 1552(a), the AFBCMR had discretion whether to void previous pass-overs before recommending that an SSB consider

an officer's corrected record. Pet. App. 36-38. The court further stated that, "[i]n cases in which the error is found to be egregious, when the [AFBCMR] is sure of the need to void previous passovers," the court would "assume the [AFBCMR] will exercise its full authority." *Id.* at 38. "[I]n cases in which the [AFBCMR] lacks the confidence to make a fundamentally military promotion decision," however, the court explained that the AFBCMR "is not obligated to resolve an officer's promotion prospects by performing a harmless error analysis. Instead, the [AFBCMR] may recommend that the fundamental promotion determination be made by the SSB." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 20-28) that the court of appeals departed from past precedent holding that an officer non-selected for promotion is entitled to constructive reinstatement and back pay unless the BCMR is satisfied that the government has proved that the error in the original non-selection was harmless. Petitioner further argues (Pet. 28-32) that Section 628 did not change that legal landscape. In his view (*ibid.*), Section 628 operates retroactively only when the SSB recommends the officer *for promotion*; when the SSB recommends that the officer *not be promoted*, petitioner contends that a SSB's decision does not relate back to the original non-selection decision and therefore the officer is entitled to back pay from the date of the original decision until the effective date of the SSB recommendation that the officer not be promoted. Those arguments lack merit.

1. Section 628 provides that the military may convene a SSB to determine whether an officer should be recommended for promotion when the officer origi-

nally was not selected for promotion by a board whose proceedings were "contrary to law or involved material error of fact." 10 U.S.C. 628(b)(1)(A). As the court of appeals observed (Pet. App. 36), nothing on the face of Section 628 supports petitioner's cramped reading that the statute applies only prospectively when the SSB decides not to recommend an officer for promotion.

The text of Section 628 indicates that the SSB's decision replaces the original non-selection decision, regardless of the outcome of the SSB's decision. Section 628(b)(2) requires the SSB to consider "the record of the officer as his record, if corrected, would have appeared to the board that [originally] considered him." Thus, Section 628 operates retroactively by dictating that the SSB replicate the original proceeding, based on the officer's corrected records. The court of appeals therefore correctly held that "an SSB's decision * * * relate[s] back to the date of the original selection board's decision[,] and * * * the SSB's decision * * * stand[s] in place of the earlier selection board decision." Pet. App. 24-25. That reading is moreover confirmed by the statute's legislative history, which indicates that the statute's purpose is "to provide a means to make a reasonable determination as to whether the officer *would have been selected* if his pertinent records had been properly considered by the prior board, unfettered by material error." H.R. Rep. No. 1462, 96th Cong., 2d Sess. 74 (1980)) (emphasis added).

Moreover, the court of appeals' decision prevents the windfall that would result from the adoption of petitioner's view. As the court of appeals observed, petitioner concedes that the SSBs' decisions in 1993 not to recommend him for promotion were free of error, and that the Air Force has lawfully discharged him. Pet. App. 13, 21; see also Pet. 18. Notwithstanding his con-

cession that the errors before the promotion boards in 1984 and 1985 and the SSBs in 1986 were not prejudicial, petitioner seeks constructive reinstatement, back pay, and related benefits for approximately nine years. That reading of Section 628 defies logic and frustrates the military's mission to retain only the "best qualified" officers "to meet the needs of the armed force[s]." 10 U.S.C. 617(a).

2. The court of appeals also correctly concluded that Section 628 renders inapplicable earlier decisions of the Court of Claims that required the AFBCMR to decide whether the officer would have been promoted absent the error in the original non-selection decision. Pet. App. 25-33, 42-43. As the court of appeals explained, the SSB's substantive recommendation whether to recommend an officer for promotion renders a harmless error analysis unnecessary: "[i]f the SSB decides in favor of promotion, the analysis would conclude that the government had failed to prove that the material error that drove the case to the SSB was harmless. If the SSB decided against promotion, the harmlessness of the error would have been shown." *Id.* at 42. The court of appeals therefore correctly concluded that its earlier case law had been superseded by Section 628.[3]

Contrary to petitioner's contention (Pet. 33-35), the harmless error rule also unduly involved judges and civilian members of the BCMRs in uniquely military matters. As the court of appeals explained, although prior law had recognized that "it makes no sense to

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[3] Petitioner notes (Pet. i) that the Court of Claims' decision in *Sanders* v. *United States*, 594 F.2d 804 (1979), was cited with approval in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). This Court in *Chappell*, however, merely cited *Sanders* for the proposition that BCMR decisions may be subject to judicial review under an arbitrary and capricious standard. See *id.* at 303.

order relief for a corrections application that alleges an error lacking any impact on the passover decision," there was no "statutory tool available to resolve the basic promotion issue," *i.e.*, whether the officer should be promoted notwithstanding the error. Pet. App. 32-33. The Court of Claims therefore adopted the harmless error rule. *Id.* at 32, 42-43. That rule, however, inevitably "force[d] the civilian corrections boards and the court into the * * * obligation to make essentially military promotion decisions." *Id.* at 33. The court of appeals therefore correctly concluded that, now that Section 628 authorizes SSBs to make promotion recommendations based on corrected records, "grafting [the harmless error rule] onto section 628" risks disrupting the "[p]roper allocation of civilian and military duties and responsibilities." *Id.* at 43.

3. Petitioner also argues (Pet. 25-29) that the decision below, by requiring an officer to show "egregious error" before the BCMR voids an original pass-over decision, is inconsistent with the BCMR's responsibility to protect servicemen under 10 U.S.C. 1552. That is not correct.

BCMRs are authorized under 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." That provision neither limits the BCMR's discretion to refer an officer's records to an SSB nor mandates that in doing so the BCMR must void a pass-over decision in all instances. See Pet. App. 44-45. Moreover, BCMRs retain their full authority under the court of appeals' decision "to assure that, if utilized, a section 628 SSB produces a reasonable determination of the officer's promotion prospects." *Id.* at 45. Thus, "[i]f an officer meets an SSB unsuccessfully and can point to a material flaw in the SSB's procedures arguably under-

mining the SSB's nonselection judgment, he may petition the corrections board to alter or void the SSB's decision." *Ibid.* Indeed, petitioner successfully challenged the SSBs' decisions in 1986 and was afforded an opportunity to have newly convened SSBs review his corrected records. *Id.* at 6-8.[4] Accordingly, "[t]he civilian boards for correction of military records are no less the guardians of the military promotion process after DOPMA than they were before DOPMA." *Id.* at 46.

4. Petitioner argues (Pet. 18-19, 37-38) that the court of appeals improperly deferred to factual findings in the AFBCMR's Second Addendum without first remanding the case to determine whether the Second Addendum was authentic. Petitioner points (Pet. 37-38) to a passage in the court of appeals' opinion observing that the Second Addendum rejected petitioner's allegation that the SSBs in 1993 used impermissible supercompetitive standards when recommending that petitioner not be promoted. See Pet. App. 45.

The court of appeals, however, was not deferring to any finding of fact in the Second Addendum.[5] Rather,

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[4] For similar reasons, petitioner errs in arguing (Pet. 35- 36) that BCMRs must always void an original pass-over decision infected with error because the SSBs employ "supercompetitive" scoring procedures when comparing the officer's records to the records of other officers. Moreover, petitioner has conceded that the SSB proceedings in 1993 were free of procedural error, Pet. App. 13, 21, and petitioner does not contend that the SSBs' procedures violate the provisions of Section 628. See Pet. 18 (noting that petitioner did not cross-appeal trial court's decision that his SSBs conformed with Section 628 because he "was not concerned with whether or not a supercompetitive SSB process violated Section 628").

[5] Indeed, petitioner had conceded in the court of appeals that the 1993 SSB proceedings were free of error. Pet. App. 13, 21; Pet. 18; see also note 4, *supra*.

the court of appeals cited the Second Addendum's rejection of petitioner's allegation simply to illustrate that the BCMR is capable of deciding procedural challenges to an SSB decision without making the underlying decision whether the officer should be promoted. Pet. App. 45. Thus, as the court of appeals stated, "[t]o the extent that [it] agree[d] with any view stated in the Second Addendum, [it did] so as an independent matter of statutory interpretation." *Id.* at 47 n.2. The authenticity of the Second Addendum is therefore irrelevant to the question whether the court of appeals properly held that neither 10 U.S.C. 628 nor 1552 requires a BCMR to void an original pass-over before referring a case to an SSB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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